quirements, and the illustrious life of the late Chief Justice, ROGER BROOKE TANEY, deplore the decree, inevitable at his advanced age, which has removed him from his place of usefulness, dignity, and honor here.

Resolved, That they will wear the usual badge of mourning during the term.

Resolved, That the Chairman of this Committee move the Court, at its meeting to-morrow, to direct these proceedings to be entered on the minutes, and that a copy be transmitted to the family of the deceased Chief Justice, with the respectful assurance of the sincere sympathy of the bar.

On the next day the Hon. Thomas Ewing submitted the foregoing resolutions to the Court. They were read by James M. Carlisle, Esq., and feelingly and appropriately replied to, on behalf of the Court, by Mr. Justice Wayne.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF MASSACHUSETTS.[1]

SUPREME COURT OF NEW YORK.[2]

COURT OF APPEALS OF NEW YORK.[3]

SUPREME COURT OF PENNSYLVANIA.[4]

ACTION.

Nonsuit and Discontinuance—Second Action for same cause.—The record of a court of general jurisdiction, showing a decision that the plaintiff be nonsuited and the action discontinued, establishes no bar to a subsequent suit for the same cause of action: *Audubon, Executrix, &c.*, vs. *Excelsior Ins. Co.*, 13 E. P. Smith.

The decision in the first action having originally been that the complaint be dismissed, was amended, upon summary application by the plaintiff, so as to provide for a nonsuit and discontinuance. The propriety or legality of such amendment is not reviewable upon an appeal taken in the second action, and the amended judgment is the only evidence receivable of the disposition of the former action: *Id.*

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[1] From Charles Allen, Esq.; to appear in Vol. 8 of his Reports.

[2] From Hon. O. L. Barbour; to appear in Vol. 42 of his Reports.

[3] To appear in 13 E. P. Smith's Reports.

[4] From R. E. Wright, Esq.; to appear in Vol. 11 of his Reports.

AMENDMENT.

Change of Form of Action.—A judge has no power to grant an amendment of the complaint, at the trial, changing the action from one *ex delicto* to an action *ex contractu*: *Whitcomb* vs. *Hungerford*, 42 Barb.

A variance between the complaint and the proof, in such a case, is not one which can be disregarded, or amended, under the code, but is a failure to prove the alleged cause of action, not in some particular only, but in its entire scope and meaning: *Id.*

CHECK.

Bonâ fide Holder.—To pass the title to a check to a purchaser, so as to place him in the position of a *bonâ fide* holder, and to relieve him from the equities existing against the original holder, something more should be required of him than simply parting with money upon the individual checks of the borrower, upon the faith of receiving the avails of the check in question, when paid: *Russell* vs. *Scudder*, 42 Barb.

There should either be a delivery or some positive act, showing an actual transfer of the check itself, or a parting with the right to dispose of it: *Id.*

It would be a dangerous position to hold, in reference to paper of that character, that where the original holder kept the entire possession and full control of the check, and gave other paper for moneys advanced, the party making the advances occupies the position, and is entitled to the protection, of a *bonâ fide* holder of negotiable paper: *Id.*

COMMON CARRIER.

Liability of Shipper for Freight.—The shipper named in a bill of lading is liable to the carrier for the freight, although he does not own the goods, and the carrier has waived his lien thereon: *Wooster and others* vs. *Tarr and another*, 8 Allen.

Liability for Acts of connecting Carriers.—Common carriers doing business between certain points, and not undertaking personally for the carriage of goods to any further points, but merely engaging to forward them to their destination through the established lines of transportation beyond, are not liable upon their receipt for a bill of goods "for collection" from a person beyond the termination of their route, in the absence of any special contract creating an additional obligation for the failure of other carriers, to whom in the ordinary course of their business the bill was intrusted for collection, to pay over the amount received by them upon the same: *Lowell Wire Fence Company* vs. *Sargent and another*, 8 Allen.

CONTRACT.

Specific Performance.—The defendants made an agreement with the plaintiff by which they stipulated that on the payment by him of $200,000, for a certain number of shares of the capital stock of a railway company, then belonging to them, new directors, to be nominated by the plaintiff and his co-purchaser, H., should be substituted in the place of all the other directors, except the plaintiff and H., who were then directors. *Held*, that the contract was an attempt improperly to

interfere with the rights of others, and was clearly contrary to public policy: *Fremont* vs. *Stone*, 42 Barb.

Held, also, that if the subject-matter of the contract was of that species which would authorize a court of equity to interpose and decree a specific performance, the object and nature of it would forbid any such interposition: *Id.*

The plaintiff induced H., the trustee, who held the package containing the certificates of stock, &c., to deposit it in a bank. H. at the same time directed the cashier to deliver the package to the plaintiff on his depositing the balance of the purchase-money to the credit of H. The plaintiff accordingly paid that sum to the bank, and received the package, without requiring the performance of the stipulation relative to the change in the board of directors, or mentioning the subject. *Held*, that even if the contract were such as a court of equity would compel the parties specifically to perform, the circumstances of the case would debar the plaintiff from any right to that relief; and that he could not now prevent H. from receiving the purchase-money and remitting it to the vendors of the stock: *Id.*

Corporation.

Payment of Corporate Debts by Stockholder.—A payment of corporate debts by a stockholder in a foreign corporation will be deemed to have been voluntary, in the absence of proof that he was legally liable therefor: *Eastman* vs. *Crosby*, 8 Allen.

Right of Bondholder of Railroad Company to convert Bonds into Stock.—Where, by the terms of a railroad bond, a period was fixed within which it might be converted into stock at the option of the holder, an agreement for the extension of the time of payment before maturity of the bond does not extend the right of conversion after the time limited therefor: *Muhlenberg* vs. *The Philadelphia and Reading Railroad Co.*, 11 Wright.

Damages.

Where no averment of Special Damages.—In actions for the breach of a contract, or in actions on an indemnity bond, if the plaintiff states no special damages in his complaint, he is confined, in his recovery, to such only as arise from the breach, and then only to such as are proximate, and are the fair, legal, and natural result of the act provided against: *Hallock* vs. *Belcher*, 42 Barb.

Measure of Damages in proceeding against Railroad Companies for Land occupied and Injury done in construction of Road.—In assessing the damages caused by the construction of a railroad through a farm, a proper standard is the market value of the land taken: the jury may also allow for the disadvantages resulting from the manner in which it is cut. Evidence is also admissible as to what the property would have sold for before and after the road was made and in successful operation: and such difference in value is a measure of damages: *The East Pennsylvania Railroad Company* vs. *Hottenstine*, 11 Wright.

Debtor and Creditor.

Statute of Limitations.—An agreement by a creditor to extend the right to redeem land which is mortgaged to him to secure his debt, and not to foreclose the mortgage for a specified time, does not extend the personal liability of his debtor beyond the time at which it would otherwise cease by the statute of limitations: *Ball* vs. *Wyeth*, 8 Allen.

Preferences by Insolvents.—The mere circumstance that a merchant makes a disposition of his property, when he becomes insolvent, and is pressed by creditors, is no conclusive proof that he intends to defraud them: *Loeschigh et al.* vs. *Bridge et al.*, 42 Barb.

The fact that creditors are delayed in the collection of their claims is not of itself sufficient to set aside a sale of property, unless the sale is accompanied by an intent to defraud: *Id.*

Where the sale is for the full value of the goods, and the proceeds of it are appropriated to the payment of *bonâ fide* debts, there should be no presumption of fraud: *Id.*

Decedent's Estate.

Ancillary Administration in another State.—If ancillary administration is taken out in another state upon the estate there of a deceased citizen of Massachusetts, a judgment there rendered, establishing a claim against the estate, is not binding here, and cannot be proved against the estate here; nor can the creditor establish his claim here against the executor, or against the legatees, to compel them to refund money paid to them by the executor, after the expiration of the time limited for the presentation of claims against executors, although the judgment was rendered after the expiration of such time: *Low* vs. *Bartlett and others*, 8 Allen.

Elections.

Quo Warranto—Inspectors of Elections—Evidence in contested Elections.—Upon the trial of a *quo warranto* to determine the title to an office depending upon a general election, the question is who received the most legal votes: *The People ex rel. Smith et al.* vs. *Pease*, 13 E. P. Smith.

The inspectors of elections are not judicial, but administrative officers; their decision is final only as to receiving or rejecting votes; but the question whether a voter was or was not entitled to vote, is open to examination in subsequent proceedings upon any competent evidence: *Id.*

It seems that the inspectors have no authority to reject a vote except in the special cases where it is expressly given by the statute, as when the voter refuses to take the oath, or to answer questions, stands convicted of crime, or has made a bet on the election: *Id.*

A voter called as a witness may be asked for whom he voted, and, if he declines or is unable to state, circumstantial evidence may be used to ascertain the fact, and he may be asked for whom he intended to vote, as one of the circumstances bearing upon the question: *Id.*

For the purpose of showing that a person voted, the poll-list kept at the election is admissible, though not signed by the inspectors or clerks,

having no heading denoting its character, and never having been filed in the town clerk's office: *Id.*

Where a voter is proved to have been alien born, and there is *primâ facie* evidence that he had not become a citizen by naturalization or otherwise, the burden of showing that he has become a citizen is cast on the party desiring to retain the vote; and, in the absence of such evidence, the vote is to be disallowed: *Id.*

But where the evidence is only that one had voted and was alien born, the presumption is that he voted legally, and had qualified himself by naturalization: *Id.*

EQUITY.

Title of Plaintiff to Relief.—If a bill in equity is brought in behalf of the plaintiff and such others having a like interest as may come in to prosecute the suit, and no others come in, the plaintiff, in order to maintain his bill, must show that he is himself entitled to equitable relief: *Hubbell* vs. *Warren*, 8 Allen.

ESTATE.

Restrictions on the Use of.—If no permanent restriction upon the use of an estate is created by deed, a court of equity will not imply one under an alleged independent agreement, unless such agreement is clearly established: *Hubbell* vs. *Warren*, 8 Allen.

A simple agreement between the owners of adjacent estates for the erection of buildings thereon in a uniform manner, and at a certain distance from the street, does not by implication require that the buildings shall thereafter remain in the same position or of the same size or shape as when erected: *Id.*

If the owner of two adjacent lots of land conveys one of them subject to a condition that the buildings to be erected thereon shall be set back a certain distance from the street, and with a warranty that the premises are free from all encumbrances made or suffered by him, a previous mutual oral agreement between the grantor and grantee that they will set back the buildings to be erected by them a greater distance from the street cannot be enforced by one of them in equity: *Id.*

ESTOPPEL.

Admissions.—Admissions of a party, whether of law or of fact, when acted upon by others, are conclusive against the party making them, in all cases between him and the person whose conduct he has thus influenced: *Hawley* vs. *Griswold*, 42 Barb.

A defendant will not be allowed to give evidence of a particular fact, where it appears, 1st. That he has made an admission which is clearly inconsistent with the evidence he proposes to give; 2d. That the plaintiff has acted upon the admission; and, 3d. That the plaintiff would be injured by allowing the truth of the admission to be disproved: *Id.*

EVIDENCE.

Experts—Form of Question.—There is no established form for questions to experts in this commonwealth, and any question may be proper which will elicit their opinions as to the matters of science or skill which

are in controversy, and at the same time exclude their opinion as to the effect of the evidence in establishing controverted facts: *Hunt* vs. *Gaslight Co.*, 8 Allen.

Fraud.

False Assurances—Action upon.—No action lies to charge a person upon or by reason of false oral assurances concerning the credit and ability of a corporation of which he was the treasurer, made in order to induce the plaintiff to receive a note of the corporation, signed by him as treasurer: *McKinney* vs. *Whiting*, 8 Allen.

Husband and Wife.

Agency.—A married woman may act as the agent of her husband, and such agency may be created either verbally or by writing. The addition of a seal to the writing appointing her will not have the effect to destroy the agency: *Goodwin* vs. *Kelly*, 42 Barb.

Innkeepers.

Liability for Goods destroyed by Fire.—The liability of an innkeeper is of the same stringent character as is that of a common carrier: that is to say, both are deemed to be *insurers* of the property delivered to them, with a consequent liability for loss and damage happening to it while in their possession; except when such loss or damage is occasioned by the act of God or the public enemy, or through the fault of the owner: *Hulett* vs. *Swift*, 42 Barb.

Accordingly *held* that an innkeeper was liable for property of a guest, destroyed by *fire*, while in a barn attached to the inn: *Id.*

Insurance.

Verbal Agreement—Evidence.—An application for the insurance against fire of certain engravings, similar in all respects to others on which the insurer had recently issued a policy to the same applicant, was made on Saturday; the parties agreed verbally upon all the terms of such insurance except the rate of premium; the previous insurance was mentioned in the conversation, and the insurer promised to make out a policy and send to the assured on the next Monday morning. *Held*, that a jury might well find a present contract to insure at the former rate of premium, and to furnish the written evidence on Monday, which authorized a recovery for a loss happening on the intervening Sunday: *Audubon* vs. *Excelsior Ins. Co.*, 13 E. P. Smith.

Evidence that the insurers were unacquainted with the manner in which the building was occupied where the insured property was located is too remote to affect the question whether they made the contract, and immaterial if they actually made it: *Id.*

In determining the question whether the insurer positively undertook to insure, or stated that he would see about it, the jury are authorized to consider the probability of the applicant's being satisfied with the latter answer: *Id.*

Lease.

Injuries through ordinary Wear or unavoidable Accident.—If a lease

of buildings contains a written clause providing that they "are to be kept in repair and maintained in good condition by the lessee," and printed clauses providing that at the end of the term the lessee will quit and deliver up the premises "in as good order and condition (reasonable use and wearing thereof, fire and other unavoidable casualties excepted), as the same now are or may be put into" by the lessor, and that the lessee shall keep the buildings insured against loss by fire, in a specified sum, payable to the lessor, the lessee is not liable to repair injuries which occur through ordinary wear, or fire, or other unavoidable casualties: *Ball* vs. *Wyeth*, 8 Allen.

LIMITATIONS.

Payment—Estoppel.—J. G. and S. G. being indebted to the plaintiff, upon a note made by them jointly, rendered an account of wood delivered by them to the plaintiff, under certain contracts; and a settlement being made between the plaintiff and S. G., a balance of $260.46 was found due from the plaintiff to J. G. and S. G. for wood, which amount the plaintiff, with the consent of S. G., indorsed upon the note. J. G., previous to such settlement, had consented that whatever sum was due to the plaintiff on the wood-contracts should be indorsed on the note; and after the indorsement was made, he said it was all right. *Held*, that the indorsement must be held to have been made by the direction and with the consent of J. G., and was a payment by him, which prevented his interposing the defence of the Statute of Limitations: *Hawley* vs. *Griswold*, 42 Barb.

MANDAMUS.

Issue of Peremptory Writ.—Though the practice of issuing a peremptory mandamus in the first instance is not to be commended, it is within the power of the court; and the objection, that an alternative writ should have first issued, is not available on error: *The People, ex rel. Belden*, vs. *The Contracting Board*, 13 E. P. Smith.

MORTGAGE.

To secure Liabilities without specifying the Amount.—A mortgage, duly recorded, is not void, as to purchasers or creditors, for uncertainty, when, being conditioned to secure liabilities already incurred, it does not specify the amount: *Young's Adm'x., et al.*, vs. *Wilson et al.*, 13 E. P. Smith.

Power of Sale.—A power of sale contained in a mortgage of real estate may be executed after the mortgagor's death: *Varnum* vs. *Meserve*, 8 Allen.

Of Chattels—Delivery of Possession.—If property mortgaged is in the possession of a third person, an immediate delivery is not necessary: *Goodwin* vs. *Kelly*, 42 Barb.

Where the vendor was absent, and the property sold was in the ware-room formerly occupied by him and his partner B., but then occupied by such partner only; and shortly after the execution of the bill of sale, the purchaser demanded the goods of B., but upon his claiming commissions on the sale to the purchaser, before he would give up the pro-

perty, and suggesting that there was a prospect of his selling a portion of it, the property was left with him; *Held*, that the above rule was applicable so the case: *Id.*

Where G., upon obtaining $200 from the plaintiff, told him she would return it if she could; or, if not, that she would sell certain property to him for $1000, if he could make an arrangement; *Held*, that it was a question for the jury to determine, whether this was a mere mortgage or an absolute sale, under proper directions from the court: *Id.*

Judgment on Scire Facias sur Mortgage—Validity of as against Terre Tenant with Notice to Defend.—A purchaser of mortgaged premises, who has as *terre tenant* an opportunity to defend in an action upon the mortgage, cannot, after verdict and judgment, deny that the amount thus fixed is due upon it; nor can his mortgagees, after verdict and before final judgment on the first mortgage, do so either: *Schnepf's Appeal*, 11 Wright.

Negligence.

Defective Highway.—A person who, while using a highway simply for the purpose of play, meets with a personal injury by reason of a defect therein, cannot maintain an action to recover damages therefor against the city or town which is bound to keep the same in repair: *Blodgett* vs. *Boston*, 8 Allen.

Riding on Platform of Car.—The court cannot say, on a bill of exceptions, that riding upon the outside platform of a horse railroad car is such a want of ordinary care as to prevent a recovery for an injury sustained by being thrown therefrom: *Meesel* vs. *L. & B. R. R. Co.*, 8 Allen.

Evidence in Action for Escape of Gas.—In an action against a gas-light company to recover damages for an injury to the plaintiffs' health caused by an escape of gas from a main pipe in a public street, from which it passed through various sewers and drains into the cellar of the house and thence into the house occupied by the plaintiff, evidence is competent to show that all the other persons living in the same house, who had been in good health before the time complained of, afterwards became ill, for the purpose of showing the effect of the gas upon others who inhaled it at the same time with the plaintiff; and it is immaterial whether the injury was caused by inhaling gas of the defendants, or other gases from the sewers and drains which it set in motion, provided the plaintiff was not guilty of negligence, and the defendants were guilty of negligence: *Hunt* vs. *Lowell Gas Light Co.*, 8 Allen.

Practice.

Judge's Charge—New Trials.—The commentaries of a judge, at the circuit, upon the evidence, are not the subject of exception. If he inadvertently misstates the facts, the counsel should correct him at the time. If he expresses an opinion upon the evidence, it cannot be reviewed on exceptions: *Powell* vs. *Jones*, 42 Barb.

Although it is the duty of a judge in charging a jury, to present fairly both sides of the case, yet his omission to refer to a particular

portion of the testimony which is deemed material on the one side, without his attention being directed to it especially, is not a good ground for a new trial, *it seems: Id.*

What is Cumulative Evidence.—It seems that entirely new and positive testimony, seeking to contradict testimony given on the trial, and to show that it was untrue, cannot be deemed cumulative: *Id.*

The rule in regard to cumulative evidence was adopted for the purpose of making parties vigilant in preparing their cases, and no diligence could guard against evidence which the defendant alleges is false: *Id.*

Where the newly-discovered evidence, as disclosed by the affidavits, is so conflicting that it probably would not produce a different verdict, a new trial would be of no avail; and the court should not disturb a verdict to give a party an opportunity to introduce testimony which would not be of any advantage to him, nor tend to promote the ends of justice: *Id.*

Promissory Note.

Alteration.—The holders of a promissory note, without the knowledge or consent of the indorser, procured a third person to subscribe it for the purpose of adding to their security. The subscription was the same in form as if he had been an original maker. This is not such an alteration as to vitiate the note or discharge the indorser: *McCaughey et al.* vs. *Smith et al.*, 13 E. P. Smith.

Bonâ fide Holder.—Where a promissory note, payable on demand with interest, was transferred to the plaintiff, a *bonâ fide* holder, nearly three months after its date: *Held*, that it was not to be deemed dishonored at the time of the transfer, so as to let in a defence existing in favor of the maker against the payee: *Herrick* vs. *Woolverton*, 42 Barb.

Such a note is a continuing security, and is not due without an actual demand; nor can it be treated as dishonored, until it has in fact been presented and payment refused: *Id.*

A note payable on demand, with interest, is not due until demanded, and hence cannot draw interest until that time, or until a suit is brought, which the law regards as equivalent to a demand: *Id.*

Replevin.

Liability of Sheriff where Sureties fail to justify.—The judgment in replevin having been for damages only, and not for the delivery of the property, the sheriff is not liable for such damages by reason of the failure to justify of sureties who, on the arrest of the defendant in replevin, had given an undertaking for the delivery of the property if adjudged, and for the payment of such sum as for any cause might be recovered against such defendant: *Gallarati* vs. *Orser*, 13 E. P. Smith.

To render him liable, there must be a judgment under the execution on which the property might be sought and delivered: *Id.*

Trover.

Agreement.—To maintain an action for the conversion of property, the plaintiff must show that he was entitled at least to the possession at the time of the alleged conversion: *Whitcomb* vs. *Hungerford*, 42 Barb.

A contract for the sale and purchase of a horse for $1000, one hundred dollars being paid down, and the balance to be paid in thirty days; the amount paid down to be forfeited in case of default; is an executory and not an executed contract. It does not transfer or convey the property and possession *in præsenti*, but the title remains in the vendor until the price is paid: *Id.*

Even if such a contract were to be regarded as amounting to a conditional sale, it would not give the purchaser a right to maintain an action for the conversion of the horse before he had complied with the conditions. Until that has been done, the title does not vest in him: *Id.*

Vendor and Vendee.

Recovering back Money paid upon an Agreement.—The law will not allow a party, who is wholly in default, to recover back money paid in part performance of an executory agreement, if he afterwards breaks it and refuses to go on and perform the residue: *Haynes* vs. *Hart*, 42 Barb.

Where, upon the sale of a canal-boat, it was agreed that the purchaser should have the use and possession of the boat until default in making payments, in which case the vendor might take possession of the boat, and declare the contract void; and upon the default of the purchaser the vendor did declare the contract void, and took possession of the boat; *Held*, that the purchaser could not recover back the payments he had made: *Id.*

Opinion of Witness as to Value—Former Suit when a Bar.—A mere omission, by a vendor of chattels, to volunteer information, without inquiry, of a difficulty known to him and unknown to the purchaser, does not constitute fraud and entitle the purchaser to damages: *McDonald* vs. *Christie*, 42 Barb.

The vendor has a perfect right to be silent, leaving the purchaser to examine for himself or to require a warranty. And unless by words or acts he leads him astray, he is not liable for fraud: *Id.*

In an action for fraud in the sale of a horse, a witness who swears to his knowledge of the value of horses, from having kept them, and dealt in them, for a number of years, and that he was acquainted with the horse in question, is competent to give an opinion as to the value of the horse: *Id.*

Where the purchaser of a chattel, in an action brought against him by the vendor, upon the mortgage given for the price, set up as a defence the fraud of the vendor, upon the sale, but afterwards, and before any adjudication thereon, withdrew the defence; *Held*, that the suit brought upon the note was not a bar to a subsequent action brought by the purchaser, against the vendor, to recover damages for fraud on the sale: *Id.*

A defendant may, in such a case, elect whether he will recoup his damages when sued upon the note, or bring his cross-action, and recover in that for the alleged fraud: *Id.*

Will.

Will made in New Jersey—Validity of to pass Ground-Rents in Pennsylvania.—Where a married woman in execution of a power vested

in her by a deed of trust, made in contemplation of marriage, comprising personal estate only, made her will in another state, but in the form required by the laws of Pennsylvania to pass her separate property, giving and bequeathing her "residuary estate" to legatees named "share and share alike, their heirs and assigns for ever," Pennsylvania ground-rents, acquired by her subsequent to the date of the will, pass thereby to the legatees: *Alexander* vs. *Paxson et al.*, 11 Wright.

Nuncupative Will—How established.—A nuncupative will cannot be established where neither the words nor their substance, as used by the alleged testator, were committed to writing as proof of a bequest, or to be preserved as such, by any one, and no proof was made of a request by testator to bystanders to bear witness that the words used were his will: *Taylor's Appeal*, 11 Wright.

A letter written by one person, announcing to another the death of the alleged testator, and in a general way his disposition of his estate, is not such evidence as will make out a nuncupative will, especially where neither produced before the register's court, nor proven to have been lost or destroyed; nor is a fragment of an unsigned letter, by the same witness, written two days after the testator's death, sufficient where no testamentary words were used, nor the disposition of his property set forth, but only that he had left his property to his wife: *Id.*

Probate.—A testator commenced his will as follows: "I, A. B., being about to go to Cuba, and knowing the danger of voyages, do make this as my last will and testament, in manner and form following: First, if by casualty or otherwise I should lose my life during this voyage, I give and bequeath to my wife," &c.; and afterwards gave independent bequests, and spoke of the instrument as his last will and testament. He made the voyage and returned in safety. *Held*, that the will should be admitted to probate: *Damon and another* vs. *Damon*, 8 Allen.

Charging of Legacy on Land.—L. S., by her will, bequeathed to the plaintiffs, to be received by them and to be appropriated to the forwarding of the gospel, the sum of $500, and to her brothers and sisters share and share alike, the balance of her estate to be divided equally between them; which several legacies or sums of money she ordered and directed to be paid to the several legatees within one year after her decease. After the will was admitted to probate, the assets received being insufficient to pay the debts of the testatrix, the real estate was sold, by order of the surrogate, and after payment of debts and expenses, the sum of $729.66 remained on hand. *Held*, that the testatrix intended to charge her real estate with the payment of the legacy of $500 bequeathed to the plaintiffs; and the amount of such legacy, with interest and costs, was ordered to be paid out of the fund in the hands of the surrogate: *The Roman Catholic German Church of the Holy Cross of Albany* vs. *Wachter et al.*, 42 Barb.